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MORTON v. MANCARI: NEW VITALITY FOR THE INDIAN PREFERENCE STATUTES

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In *Morton v. Mancari*[1] the Supreme Court significantly clarified the unique relationship between the federal government and the American Indian. Through a unanimous decision the Court turned back a major challenge to the validity of existing Indian Preference Statutes and illuminated Congress' unique obligation toward the tribal Indian in American society.[2] The Supreme Court definitively determined that the Equal Employment Opportunity Act of 1972 did not repeal the Indian Preference Statutes; moreover, it determined that this Indian preference does not constitute invidious racial discrimination in violation of the due process clause of the fifth amendment.

This note will proceed from a brief statement of the facts and holdings in this case to a short background of the federal policy of granting hiring preferences to Indians in the Indian Service. Subsequent sections will offer a critical analysis of the two primary issues raised in this case and will discuss the practical effects and implications of this important decision.

The Indian Reorganization Act of 1934[3] provided for an employment preference in the Bureau of Indian Affairs for all Indians who qualified under BIA regulations.[4] While there are earlier preference

1. 94 S. Ct. 2474 (1974).

2. The validity of the Indian Preference Statutes has never before been challenged. These statutes have been construed however. See Freeman v. Morton, 499 F.2d 494 (D.C. Cir. 1974) (preference held to apply to lateral transfers as well as to hiring and promotions); Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) (preference held inapplicable to reduction in force).

3. For a general discussion of the Indian Reorganization Act of 1934, see Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

4. Eligibility criterion are found in 44 BIAM 335, 3.1:

> An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recog-

statutes of limited scope,[5] the broad sweep of section 472 of title 25 now controls this area of Indian employment preference. Section 472 (originally enacted as section 12 of the Indian Reorganization Act of 1934) provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

The Commissioner of Indian Affairs has subsequently issued a directive extending the application of this Indian preference beyond the initial hiring stage to include interagency promotional situations.[6]

Appellees, non-Indian BIA employees, instituted a class action on behalf of themselves and other non-Indian employees similarly situated.

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nized tribe. It is the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filing a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment.

5. 25 U.S.C. § 45 (1963) (originally enacted as Act of June 30, 1834, § 9, 4 Stat. 737):

> In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.

25 U.S.C. § 46 (1963) (originally enacted as Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97) (preference in Indian Service employment of clerical, mechanical and other help); 25 U.S.C. § 44 (1963) (originally enacted as Act of August 15, 1894, § 10, 28 Stat. 313) (preference for employment of herders, teamsters, and laborers); 25 U.S.C. § 274 (1963) (originally enacted as Act of June 7, 1897, § 1, 30 Stat. 83) (preference in employment of matrons, farmers, and industrial teachers in Indian schools); 25 U.S.C. § 47 (1963) (originally enacted as Act of June 25, 1910, § 23, 36 Stat. 861) (general preference as to Indian labor and products of Indian industry).

6. The Court cited BIA Personnel Management Letter No. 72-12 (1972) which states in part:

> The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. . . . The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately and is incorporated into all existing programs such as the promotion program. . . .

The Court's opinion in *Mancari* did not address promotional preference.

They alleged specifically that the Indian Preference Statutes were implicitly repealed by the 1972 Equal Employment Opportunity Act and that such employment preferences constituted racial discrimination in violation of the due process clause of the fifth amendment.[7]

The three-judge district court, from which this case was appealed, determined that section 11 of the Equal Employment Opportunity Act of 1972[8] did repeal the preference statutes. While the district court made clear that it based its decision on an interpretation of the 1972 Act, the court also asserted that the Indian Preference Statutes must fail on constitutional grounds.

Relying primarily on an interpretation of legislative intent, the Supreme Court reversed the district court's decision regarding the scope and application of the 1972 Act. Significantly, the Court also found section 472 to be constitutionally valid.

The Indian Preference Statutes, which date back to 1834, provide a preference to tribal Indians for employment in the Bureau of Indian Affairs. Subsequent to the first such statute in 1834, Congress has recurrently enacted various preference statutes, including preferences for the employment of clerical, mechanical, and other help on reservations, the employment of herders, teamsters, and laborers in the Indian Service, and the employment of matrons, farmers and industrial teachers in Indian schools.[9] Though the earlier preference statutes have no documented history, the congressional objectives behind these unique statutes can be gleaned from an examination of the legislative history accompanying the Indian Reorganization Act of 1934.

The records of the House and Senate Committee Hearings on Indian Affairs reveal vigorous expressions detailing the necessity for the Indian Preference Statutes.[10] Such preferences were found to be vital in according Indians greater participation in their own self-government; moreover, they were deemed necessary to fulfill the trust obliga-

7. Appellees' theory of attack is legitimized by Bolling v. Sharpe, 347 U.S. 497 (1954), which established that racial discrimination may be so arbitrary and unreasonable that it violates the fifth amendment's due process clause. Thus, a governmental act which would violate the 14th amendment's equal protection clause, if taken by a state, might be held to violate the due process clause if taken by the federal government.

8. 42 U.S.C. § 2000e-16(a) (Supp. II, 1973).

9. Statutes cited note 5.

10. For pertinent congressional expressions favoring the Indian Preference Statutes see, S. REP. No. 1080, 73d Cong., 2d Sess. 1 (1934); *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 39 (1934); *Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. 256 (1934); 78 CONG. REC. 9270 (1934) (remarks of Senator Hastings), 11123 (remarks of Senator Wheeler), 11727, 11729, 11731-32 (remarks of Representative Howard).

tion due the American Indian and to neutralize the harmful effect upon the Indian Nations of an unsympathetic non-Indian controlled Bureau of Indian Affairs.

Senator Wheeler, a co-sponsor of the Indian Reorganization Act of 1934, expressed the reason for a preference this way:

> We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. . . .[11]

This statement illustrates the nature of the unprecedented political relationship existing between the federal government and the American tribal Indian. It is because of this unique relationship that Congress sought to provide a favorable atmosphere within which the political and economic self-determination of the Indian Nations could be realized. Congress believed such an atmosphere could be created by an Indian dominated Bureau of Indian Affairs; thus, the BIA was envisaged as an agency which would be controlled by, and would truly represent the interests of, the American Indian.

Summing up the need for the Indian preference, Congressman Howard, a co-sponsor of the 1934 Act, declared:

> It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians.[12]

The Equal Employment Opportunity Act of 1972 provided the focus for appellees' attack on the Indian Preference Statutes. In slightly amended form, this Act carried over and applied to the federal government the substantive anti-discrimination law contained in Title VII of the Civil Rights Act of 1964.[13] The specific provision of the 1972 Act used by appellees was section 2000e-16(a), which provides as follows:

All personnel actions affecting employees or applicants for

11. *Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, at 256 (1934).

12. 78 CONG. REC. 11731 (1934).

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1964), prohibited discrimination in private employment on the basis of race, color, religion, sex, or national origin.

> employment . . . in military departments . . . in executive agencies . . . in the United States Postal Service . . . and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.[14]

In reaching the conclusion that the Indian Preference Statutes were not controlled by the anti-discrimination language of section 2000e-16(a), the Supreme Court first scrutinized the Civil Rights Act of 1964. The Court noted that the 1964 Act specifically exempted from its effect the employment preference for Indians by Indian tribes or by industries located on or near Indian reservations.[15] This Title VII exemption, the Court asserted, disclosed congressional recognition of the unique legal status of tribal activities. Since the anti-discrimination provisions of the 1964 Act were carried over and applied to the federal government by the 1972 Act, and since there was no other mention of Indian preference in the legislative history of the Equal Employment Opportunity Act, the Court concluded that Congress had not altered its approval of Indian employment preferences in specific areas. In light of the fact that Congress had not modified the Indian exceptions found in the 1964 Act, the Supreme Court found it unreasonable to conclude that, through the 1972 Act, Congress intended to eliminate longstanding BIA preference statutes while allowing the continuance of an Indian preference in private employment situations. The Court thus refused to attribute to Congress the irrationality and arbitrariness asserted by appellees.

In further support of their position that Congress had intended to exclude the Indian Preference Statutes from the effect of section 2000e-16(a), the Supreme Court pointed out that three months after the 1972 Act was passed Congress enacted two new Indian preference laws.[16] These statutes, which require that Indians be given preference

14. Equal Employment Opportunity Act of 1972, § 11, 42 U.S.C. § 2000e-16(a) (Supp. II, 1973).

15. 42 U.S.C. §§ 2000e(b) and 2000e-2(i). Section 2000e(b) excludes Indian tribes from the Act's definition of who constitutes an employer. Section 2000e-2(i) states:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

16. Education Amendments of 1972, 20 U.S.C. §§ 887c(a), (d), 1119a (Supp. II, 1973).

in governmental programs which train teachers of Indian children, made it increasingly improbable, it was reasoned, that Congress intended to repeal section 472 through the implementation of the Equal Employment Opportunity Act of 1972.

Finally, the Supreme Court upheld the integrity of section 472 by using several rules of statutory interpretation. The general rule, that repeals by implication are not favored, was found to militate against the repeal of section 472.[17] In addition, the Court applied the rule that, in the absence of congressional intent to the contrary, two statutes capable of co-existence should both be regarded as effective.[18] With reference to this latter interpretive guide, the Court found that the special employment preferenc of the BIA could readily co-exist with the more general rule prohibiting employment discrimination found in Title VII.

It is important to note that behind the Court's carefully reasoned decision in this case lies the strong conviction that a different conclusion would have disregarded not only the history and purpose of the preference statutes but also the unique legal relationship between the federal government and the American Indian Nations. The history and purpose of the preference statutes, as previously discussed, and the peculiar relationship between Indians and the federal government strongly influenced the Court. This unique relationship is more fully examined during the Court's discussion of the constitutional issues raised in this case.

Though the district court mentioned merely in passing that it could have based its decision on constitutional grounds, the Supreme Court squarely addressed appellees' contention that the preference in section 472 constituted invidious racial discrimination in violation of the due process clause of the fifth amendment. The Court maintained that this issue could be resolved through the interaction of two factors—the first being the unique legal status of federally recognized Indian tribes under federal law, and the second being the plenary power of Congress to legislate with regard to these Indian tribes.

The Court had characterized the nature and origin of the Indian's unique legal status in *Board of County Commissioners v. Seber*:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their

17. For the development of this rule see Wood v. United States, 41 U.S. (16 Pet.) 336, 342-43, 363 (1842); Posedas v. Nat'l City Bank, 296 U.S. 497, 503 (1963).

18. United States v. Borden Co., 308 U.S. 188 (1939).

> lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[19]

The Court has reaffirmed the duty described by this passage and contended that this serious commitment would be in jeopardy if the Indian Preference Statutes were found to be unconstitutional.[20]

In finding section 472 to be constitutionally valid, Justice Blackmun, writing for the Court, maintained that the plenary power of Congress to legislate such Indian Preference Statutes is based upon a history of treaties and the assumption of a "guardian-ward" status. Justice Blackmun further stated that this power is drawn explicitly and implicitly from the Constitution through article I, section 8, clause 3, which provides power to "regulate commerce . . . with the Indian tribes," and through the treaty power of article II. He pointed out that the reference in article I to the regulation of commerce with the Indian tribes singles out Indians as the proper subject for separate legislation, and thus lays the groundwork for other legislation peculiar to the tribal Indian.

While the Court found that Congress had the duty and the authority to create special legislation for the American Indian, it stopped short of characterizing the recipients of the Indian preference as a racial group. Though appellees asserted that the classification created by section 472 was racial in nature, the Supreme Court found instead that this classification created a legitimate nonracial employment criterion. The Indians to whom this preference applied were found to be affected, not as members of a specific racial group, but rather as components of quasi-sovereign tribal entities uniquely governed by the Bureau of Indian Affairs.

Had a racial classification been found, the charge that it was therefore inherently unreasonable and constitutionally invalid would have been more difficult to rebut.[21] The Court instead found a nonracial classification, a conclusion which is open to question. The Court's sole

19. 318 U.S. 705, 715 (1943).

20. *See* Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

21. *See* Wright v. Georgia, 373 U.S. 284 (1963); Cooper v. Aaron, 358 U.S. 1, 16 (1958); Edwards v. California, 314 U.S. 160, 184-5 (1941).

clarification of this point was the observation that since this classification includes only Indians of at least one quarter blood who are also members of federally recognized tribes, certain Indians not belonging to such tribes would be excluded from the class. This fine distinction provides the lone rationale for the Court's finding that a nonracial classification was created.

After finding the Indian preference to be political in nature rather than racial, the Court easily found a compelling governmental interest as the basis for this particular classification; it further found a reasonable relationship between the classification trait and the purpose of the statute. The important governmental interest involved was the encouragement of Indian self-government, which purpose was reasonably furthered by Indian control of the BIA.

The Supreme Court thus upheld the constitutionality of the Indian Preference Statutes by finding the classification created thereby to be consistent with the mandates of due process, and by determining that Congress had both the constitutional authority and a grave commitment to protect and provide for tribal Indians through such legislation.

While the Supreme Court in *Morton v. Mancari* offered a persuasive argument for the exemption of the Indian Preference Statutes from the effect of the Equal Employment Opportunity Act, the lasting significance of this case is to be found in the Court's response to the constitutional challenge presented. In its response the Court showed a keen appreciation for the historical perspective within which Indian legislation must be viewed. In addition, the Court gave substance to the subtle and illusive status of the American Indian in the eyes of the law as it acknowledged the exceptional nature of the Indian preference under examination. In this regard the Court declared: "In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly sui generis."[22]

Because of the novel and specific nature of the issues dealt with in *Morton v. Mancari*, the application of the Supreme Court's reasoning in this case to other areas of the law or to other racial groups is severely limited. It should be remembered that the Court addressed itself solely to one specific class of individuals to be employed by a unique federal agency; therefore, this decision affects no other agency or group of individuals.

The Supreme Court consummated its effort to define the contours

22. 94 S. Ct. 2474, 2484 (1974).

of the relationship between the tribal Indian and the federal government by creating a lasting standard with which to judge congressional action offering special treatment to Indians. This standard, which sets the permissible constitutional limits for such treatment, is satisfied if the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. More important than setting such a standard, the Court in *Morton v. Mancari* has offered an unprecedented insight into the nature and substance of this solemn obligation.